Supreme Court, U.S.
FILED

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NO. 05-

IN THE

Supreme Court of the United States

MICHAEL CHARROS,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 29, 2005

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Judicial Court of Massachusetts has decided an important federal question in a way that conflicts with relevant decisions of this Court where, after finding an egregious and intentional violation of the principles set forth in *Michigan v. Summers*, 452 U.S. 692 (1981), the court nevertheless upheld the stop and search of the petitioner on separate grounds that were not supported by the record and that the prosecution had never raised at any stage in the proceedings.

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INTRODUCTION

The petitioner was convicted in a Massachusetts Superior Court of trafficking in 200 or more grams of cocaine and other related charges. He moved unsuccessfully to suppress the contraband and other evidence against him on the theory that the manner in which he was seized violated this Court's holding in *Michigan v. Summers*, 452 U.S. 692 (1981). The Supreme Judicial Court of Massachusetts agreed that the police had indeed violated the mandates of *Michigan v. Summers*, but found the violation of the petitioner's constitutional rights to be harmless. In so ruling, the court held that the police had probable cause to arrest the petitioner without a warrant—even though the police apparently did not believe they did. Because the police could have arrested the defendant, the seizure of the petitioner and the subsequent search of his person could be justified on alternative grounds. The petitioner seeks to challenge that point and respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court, entered on March 31, 2005.

OPINIONS BELOW

The opinion and judgment of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Charros*, 443 Mass. 752, 824 N.E.2d 809 (2005) is reproduced in the Appendix.

JURISDICTION

The order of the Massachusetts Supreme Judicial Court, affirming the petitioner's conviction and the denial of his post trial motions, was entered on March 31, 2005. The petitioner seeks review of a judgment by the highest State court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides: "All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. *Procedural History*

On October 1, 1998, a grand jury in Bristol County, Massachusetts returned indictments charging the petitioner Michael Charros with trafficking in 200 or more grams of cocaine, violation of the controlled substance laws in a school zone, conspiracy to violate the controlled substance laws, unlawful possession of a firearm without an ID card, and unlawful possession of ammunition without an ID card. (Indictments Nos. 9873CR0331A-E). The petitioner entered pleas of not guilty to all counts.

On December 21, 1998, the petitioner filed a motion to suppress all evidence relating to the execution of a search warrant and a motion to suppress evidence and statements based on an unlawful warrantless search and seizure. A justice of the Massachusetts Superior Court (Tierney, J.) conducted an evidentiary hearing on the motions to suppress on August 11, 1999 and October 14, 1999. Judge Tierney issued a memorandum of decision and order denying those motions on December 29, 1999. [Appendix 52a-62a].

The defendant applied to the Supreme Judicial Court of Massachusetts for leave to file an interlocutory appeal. A single justice of that court, Ireland, J., denied the defendant's application on February 7, 2000.

On March 13, 2000, the defendant filed a motion seeking to reopen the hearing on his

motion to suppress evidence and statements on grounds unrelated to this petition. Judge Tierney held an evidentiary hearing on the motion on May 30, 2001. On June 11, 2001, he issued a memorandum of decision and order again denying the motion to suppress statements and evidence.

On December 12, 2001, trial commenced in the Superior Court before Brady, J., and a jury on all counts except the conspiracy count. Judge Brady directed a verdict for the defendant on the firearm and ammunition charges at the close of the Commonwealth's evidence. On December 21, 2001, the jury returned verdicts of guilty on the trafficking and school zone charges. On the trafficking count, Judge Brady sentenced the defendant to fifteen years to fifteen years and a day. He imposed a consecutive two and a half year House of Correction sentence on the school zone count.

The defendant filed a timely notice of appeal on January 18, 2002. The case was entered on the docket of the Massachusetts Appeals Court on October 6, 2003. On October 22, 2004, an order issued transferring the case to the Supreme Judicial Court of Massachusetts.

On March 31, 2005, the Supreme Judicial Court affirmed the petitioner's conviction. *Commonwealth v. Charros*, 443 Mass. 752, 824 N.E.2d 809 (2005).

B. *Facts Presented At Trial*

For purposes of this petition, the petitioner will adopt the recitation of the Commonwealth's evidence as set forth in the opinion of the Supreme Judicial Court of Massachusetts:

> The jury could have found the following facts. On August 10, 1998, officers of the New Bedford police department obtained a search warrant for the first-floor apartment at 164 Query Street in New Bedford, the residence of Michael and Geraldine Charros.[3]
>
> After obtaining the search warrant, numerous officers in several cars positioned themselves at various locations around 164 Query Street. At approximately 5:45 P.M. a man other than Michael left the house and drove away. Shortly thereafter Michael was seen driving away in a white van. Some officers stopped the van approximately one mile away. Michael was ordered to step outside, and a patfrisk resulted in the discovery of two small paper folds containing cocaine. One fold was randomly selected for analysis and weighed 0.47 grams. It had a street value of $20 to $25. Michael was

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[3] They had a second warrant authorizing the search of a brown pick-up truck registered to Michael.

handcuffed, placed in a patrol car, and driven back to his home.

Geraldine and the couple's eight year old son were also in the van. An officer drove them in the van back to their home. Once inside their apartment both defendants were advised of the Miranda warnings and allowed to examine the search warrants. Geraldine was permitted to arrange for a relative to remove their son from the premises. She was placed in handcuffs.

Detective Paul Oliveira asked Michael if he were willing to cooperate and show them where he kept the cocaine. He indicated he would, and he led the officers to a small room with a roll-top desk from which were seized a number of items, including a shoe box that contained a plastic bag with 244.68 grams of cocaine, eight small corner bags of cocaine (one was randomly selected for analysis and had a net weight of 0.42 grams), a small corner bag of nonnarcotic white powder, a bottle of Inositol powder, a folded paper packet of cocaine (its net weight was 0.26 grams), several square pieces of paper, $140 in cash, an open box of sandwich bags, a telephone pager, two keys, a triple-beam balance scale, scissors, a butter knife, a Harley Davidson brochure with slash marks on it, and

letters and bills addressed to both defendants.

The officers used the keys found in the desk to unlock a strongbox and a safe in a closet off the room where the desk was located. The strongbox contained an envelope with $10,000 cash, a blue bank bag with $8,750 cash, and a white plastic bag containing 28.42 grams of cocaine. The safe contained a .22 caliber handgun and ammunition.[4]

A waste paper basket under the desk contained an empty bottle of Inositol and plastic sandwich bags with corners cut away. Inositol powder is frequently used as a cutting agent to create or stretch a mixture of cocaine for retail sale. Sandwich bags are frequently used in the retail sale of cocaine by placing a small amount of cocaine in a corner, tying a knot in the bag close to the corner holding the drug, then cutting away the unused portion of the bag above the knot, leaving what is known as a "corner bag" of cocaine. Corner bags usually contain a one-half gram mixture of cocaine and sell for $20 to $25 on the street. Based on

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[4] At the conclusion of all the evidence the judge allowed Michael Charros's motion for a required finding of not guilty as to a charge of unlawful possession of a firearm and a charge of unlawful possession of ammunition concerning these items.

opinion testimony, the items seized from the desk are not consistent with personal use of cocaine, but are consistent with items used in the sale of cocaine.

From the living room, officers seized a police-band scanner that was "on" and tuned to one of the New Bedford police department frequencies. It was capable of receiving radio communications on the frequency used by the narcotics unit. One purse containing $1,500 cash was seized from the master bedroom. It contained no identification papers. The purse Geraldine had in her possession at the time she was driven back to the apartment also was seized. It contained $821 cash.

Michael admitted to Detective Oliveira that he did not use cocaine, but had been selling it for about eight years. He said he was not a big dealer, and just sold a little "here and there" to make some money. He said that the approximately 250 grams that he had in the house would last him about one month. Michael explained that he kept the money in the safe, and not in a bank, because he owed $30,000 in child support. He also explained that the .22 caliber handgun and ammunition had

belonged to his father, and that his father recently had passed away.

Both defendants testified. Michael denied telling Detective Oliveira that he had been selling drugs for eight years. He testified that he told Oliveira that Joe Ryan had brought the box of drugs to the house for safekeeping just minutes before Michael had been arrested, and that Ryan had been selling drugs for seven or eight years. Michael testified that he never sold drugs, and that he had purchased from Joe Ryan the two paper folds of cocaine he had on his person when arrested. He also denied telling Oliveira that he owed $30,000 in child support, or that he even mentioned owing child support. There had been papers on the roll-top desk that indicated a claim in excess of $30,000 had been made against him for child support, but Geraldine testified that they had retained a lawyer and the claim was reduced significantly.

Geraldine testified that Michael's father had lived with them from January, 1997, until his death in March, 1998. He suffered many medical complications related to diabetes. A leg had been amputated, he was confined to a wheelchair, and he required dialysis. Michael was his father's caretaker during the day, and

Geraldine helped out at night by preparing his meals. Because her father-in-law was on a "renal diet," his food portions, especially meat, had to be weighed with precision. The triple-beam scale, which had been kept in the pantry when he was alive, was used for this purpose, and no other. She extended his meals by sprinkling Inositol over the food. She would prepare his meals in advance and set them aside in plastic sandwich bags. After the father died, the scale was stored in the closet, and the Inositol and sandwich bags were stored in the roll-top desk. The scale had not been used after the father's death because she dropped and broke it when placing it in the closet. The police removed it from the closet and placed it on the desk during the search of her apartment.

Geraldine also explained uses for other items that had been offered by the Commonwealth as paraphernalia used in the drug trade. The pager was hers, and was used to reach Michael at a time when their child frequently became ill at school. She testified that she used the butter knife as a letter opener, and that she attended to the family bills at the roll-top desk. The scratches on the Harley Davidson brochure were the result of Michael's cutting Harley Davidson

emblems from the brochure and laminating them onto magnets.

The police scanner belonged to the father, who had listened to it constantly until his death. The father's monthly pension checks, which totaled approximately $1,100, went to his care, and to compensate Michael for giving up his job to serve as his father's caretaker. The $10,000 found in an envelope in the strongbox was money that the father had saved. As for the $8,750 in the blue bank bag, $7,000 were proceeds of two life insurance policies the father had left to the defendants, $1,100 was money Geraldine's employer had reimbursed her for a short term loan she had made, and the rest was "house money" Geraldine had put aside.

Geraldine testified that she made short-term loans to her employer, a trucking company, to help keep the company operating. The company was in bankruptcy, and she used her credit cards to pay for current company expenses. The company would then reimburse her and record the payment on its books as "toll money." Her motive for helping in this manner was to build up a good personal credit rating which she could someday use to obtain a mortgage to purchase a

home. She had twenty-six credit cards, all in good standing.

She explained that the $821 in the purse she had at the time of her arrest consisted of $800 that was ready to be used to meet her employer's needs, and she had taken $21 from the strongbox just before they were stopped by police. It was to have been used to buy supper. The $1,500 in her purse in the master bedroom was a reimbursement from her employer.

When Michael's father died, Michael became depressed. He started drinking alcohol to excess, and he resumed the use of cocaine after a period of abstention of approximately four years. This became a source of marital problems. Michael obtained his cocaine from Joe Ryan. Ryan appeared at their apartment at 5:30 P.M. on August 10, 1998. He had a cardboard box (the shoe box with the 244.68 grams of cocaine) which he asked Michael to hold for him until the next day because he had "something going down with the cops." Michael told Ryan he did not want anything to do with it, but Ryan threatened him. Ryan placed the box on the roll-top desk. Ryan also discarded a bag of trash (containing the empty Inositol bottle and the sandwich bags with

corners cut out) in the waste basket under the roll-top desk.

Michael left the room for a short time while Ryan used their telephone. When he returned, Ryan had the keys to the strongbox and the safe in his hand. Two weeks earlier, Ryan had seen Michael retrieve the keys and open the strongbox to get money to buy cocaine. Both Michael and Geraldine testified they had never seen the white plastic bag containing 28.42 grams of cocaine that police seized from the strongbox. Geraldine testified that when she opened the strongbox shortly before Ryan arrived on August 10, to get $20 for supper, the bag of cocaine was not in the strongbox.

Michael and his sister, Linda, both testified about threats that Ryan had communicated to them in late winter and spring of 1999 about what he would do to Michael if Michael continued to accuse Ryan in court. Ryan made it known that the source of his information about Michael's statements had been Detective Oliveira.

Commonwealth v. Charros, 443 Mass. at 754-758, 824 N.E.2d at 811-814. [Appendix 3a-9a].

REASONS FOR GRANTING THE WRIT

I. The Supreme Judicial Court Of Massachusetts Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court Where, After Finding An Egregious And Intentional Violation Of The Principles Set Forth In *Michigan v. Summers*, 452 U.S. 692 (1981), The Court Nevertheless Upheld The Stop And Search Of The Petitioner On Separate Grounds That Were Not Supported By The Record And That The Prosecution Had Never Raised At Any Stage In The Proceedings

In this case, the Supreme Judicial Court of Massachusetts has decided an important federal question in a way that conflicts with relevant decisions of this Court. Specifically, the Massachusetts court correctly held that the police violated principles set forth in *Michigan v. Summers*, 452 U.S. 692 (1981) by intentionally delaying their execution of a search warrant until the defendant had left his home and then stopping him a considerable distance away. Notwithstanding the clear violation of the petitioner's constitutional rights, the state court upheld the seizure and subsequent search on the theory that the police had probable cause to arrest him independent of their stated grounds. The petitioner contends, however, that although there was probable cause to search his residence, the police lacked independent grounds to arrest him. Further, the prosecution waived that theory by failing to raise it at any stage of proceedings,

including on appeal. By upholding the denial of his motion to suppress the Supreme Judicial Court effectively disregarded clearly established principles of federal constitutional law. The court's ruling effectively denied the petitioner, and will deny all similarly situated criminal defendants, the right to be free from unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. His petition for a writ of certiorari should be granted.

In this case, the police sought an obtained a warrant that authorized them to search the petitioner's residence. The warrant also permitted them to detain and search all persons present at the time of its execution. Instead of executing the warrant upon their arrival, the police intentionally waited for the petitioner to leave his home and then followed him as he and his family drove off in a van. The police stopped the vehicle about a mile from the house. At that point, they searched the petitioner, and upon finding two packets of cocaine in his pocket, they arrested him. They then returned him to the house where he made a number of incriminating admissions. Ultimately, the contraband found on his person and his admissions linked him to larger amounts of cocaine found at the house and to other evidence of drug activity. Prior to trial, the petitioner moved to suppress the evidence seized during the warrantless search of his person and the subsequent admissions. He argued that, while the police might have had probable cause to believe that contraband would be found in his residence, they lacked grounds to stop and search him without a warrant.

In opposing the petitioner's motion to suppress, the Commonwealth argued that under principles set forth in *Michigan v. Summers*, *supra*, the police could, pursuant to the search warrant, lawfully seize him at a remote location and return him to the scene. The Commonwealth further argued that the police had the right to search the defendant's person pursuant to the all persons present clause of the search warrant. In denying the petitioner's motion to suppress, the trial court agreed with the Commonwealth, holding that *Michigan v. Summers*, indeed authorized such a course of action.

The Supreme Judicial Court of Massachusetts correctly rejected that theory. *Michigan v. Summers* held that "for Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Commonwealth v. Charros*, 443 Mass. at 760, 824 N.E.2d at 815. *See Michigan v. Summers*, 452 U.S. at 705. This "Court noted that the detention of a person incident to a search of his home is but an 'incremental intrusion on [his] personal liberty[.]'" *Id.* at 761, 824 N.E.2d at 816, quoting *Michigan v. Summers*, 452 U.S. at 703. However, the Massachusetts court held that where the police intentionally allowed the petitioner to drive away and then stopped him "in spectacular fashion" a mile from his home, "[t]his was hardly an 'incremental intrusion' on personal liberty, but a significant deprivation of liberty far beyond what was contemplated in *Michigan v. Summers*[.]" *Id.* "The circumstances of the seizure of the [petitioner] also had the palpable potential

for exploitation by the officers, who otherwise had no authority to search the van in which [he and his family] were traveling." *Id.* at 761-762, 824 N.E.2d at 816.

Notwithstanding the constitutional violation, the Supreme Judicial Court upheld the search of the petitioner's person, finding that the search warrant affidavit provided the police with probable cause to arrest the petitioner. *Commonwealth v. Charros*, 443 Mass. at 765, 824 N.E.2d at 818. In doing so, the court appears to have assumed that a showing of probable cause for a search warrant necessarily establishes probable cause to arrest the suspected perpetrator. However, this Court and the lower federal courts have noted a distinction, albeit a subtle one, between the showing required to establish probable cause to search and the showing required for an arrest. *See Michigan v. Summers*, 452 U.S. at 704; *United States v. Whitner*, 219 F.3d 289, 297 (3rd Cir. 2000) ("We begin by noting the distinction between probable cause to arrest and probable cause to search."). "[W]hile it is true that there is this common ground for discussing the quantum of evidence required under the Fourth Amendment's probable cause test, it does not follow that probable cause for arrest and probable cause to search are in all respects identical. This is clearly not the case." 2 W. LaFave, *Search and Seizure*, § 3.1(b), p. 8 (4th ed. 2004). "The two determinations are measured by similar objective standards but contain different inquiries." *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996). "Each requires a showing of probabilities as to somewhat different facts and circumstances—a point which is seldom

made explicit in the appellate cases." 2 LaFave, *Search and Seizure*, § 3.1(b), pp. 8-9 (4th ed. 2004).

To justify the issuance of a warrant to search a particular location, the police must establish that a crime has been committed and that evidence of a crime will be found in the location to be searched. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). To establish probable cause to arrest, the focus is on the person, or more specifically, whether the police have reasonably trustworthy information that the defendant has committed or is committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

As the Supreme Judicial Court correctly noted, the petitioner conceded that the search warrant affidavit established probable cause to search his residence. *Commonwealth v. Charros*, 443 Mass. at 765, 824 N.E.2d at 818. That affidavit described information provided by two confidential informants, together with some limited corroboration of innocuous details. The petitioner contends, however, that more of a showing must be made in order to establish probable cause to arrest. In many of the decisions of this Court and of lower federal courts the offense is committed in the presence of the officer, and the showing of probable cause is clear. *See Illinois v. Caballes*, ___ U.S. ___, 125 S.Ct. 834, 841 (2005) (police officer had probable cause to arrest defendant for an offense committed in his presence); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). Where the offense is not alleged to have been committed in the presence of the police, and

especially where the officers rely on information provided by an unnamed informant, this Court and the lower courts have generally required corroboration of some significant details linking the suspect to the crime in order to establish probable cause to arrest. *See Taylor v. Alabama*, 457 U.S. 687, 693 (1982) (police improperly arrested defendant without probable cause based on an uncorroborated informant's tip). *See also Adams v. Williams*, 407 U.S. 143, 148-149 (1972) (police officer had probable cause to arrest defendant where he corroborated incriminating details of the informant's tip); *McCray v. Illinois*, 386 U.S. 300, 304-305 (1967) (probable cause to arrest established where informant's tip was corroborated by officers' personal observations of the petitioner engaging in suspicious activities); *Draper v. United States*, 358 U.S. 307, 313 (1959) (same).

In this case, the police did not have their informants make controlled purchases, they did not recover any contraband from the petitioner, they observed no suspicious activities, and as noted above, they confirmed only innocuous details provided by the informants. *Contrast United States v. Watson*, 423 U.S. 411, 414-420 (1976) (finding probable cause for arrest based on information from reliable informant that defendant possessed stolen credit cards where informant provided one of those cards to the officers and at a later meeting, alerted them that defendant had additional cards). The Supreme Judicial Court stated that the search warrant established probable cause both to search the residence and to arrest the defendant, but the record does not support the court's conclusion as

to the latter point. Ultimately, the state court's failure to distinguish between probable cause to search and arrest contradicts principles of federal law established by this Court. Allowance of certiorari would clarify the distinction between probable cause to arrest and probable cause to search—that is, to make explicit what has been implicit in decisions of this Court.

The Supreme Judicial Court also ruled contrary to a second clearly established principle of federal law. Specifically, in addressing the grounds cited by the trial court for denying the suppression motion, the court found that "'it is of no consequence whether the reason assigned by the judge was accurate" as long as there is some theory on which the decision can be supported. *Commonwealth v. Charros*, 443 Mass. at 765, 824 N.E.2d at 818. In fact, where the reason cited by the judge was the only reason raised in any proceeding in the Massachusetts courts, it certainly is of some consequence where the Supreme Judicial Court substituted a theory that had effectively been waived. Specifically, in opposing the motion to suppress, the Commonwealth never claimed that the police had probable cause to arrest the petitioner, nor did the motion judge rely on those grounds in upholding the search and seizure. In arguing this case before the Massachusetts appellate courts, the Commonwealth never raised this theory.

In fact, the police in this case apparently did not believe they had probable cause to arrest the petitioner. *Contrast Davenpeck v. Alford*, ___ U.S. ___, 125 S.Ct. 588, 593-594 (2005) (police believed they had grounds to arrest defendant

although they ultimately charged him with a different offense). They did not apply for an arrest warrant, nor did they claim that they were arresting him based on probable cause to believe he had committed a crime. They also did not charge him with any offense based on the information in the search warrant affidavit, relying entirely on the contraband found on his person and in the house.

This Court has held that the government "may lose its right to raise factual issues of this sort . . . when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v. United States*, 451 U.S. 204, 209 (1981). *See United States v. Thompson*, 710 F.2d 1500, 1504 (9th Cir.), *cert. denied*, 464 U.S. 1050 (1984) (alternate justifications for search waived by government's failure to raise them at suppression hearing); *United States v. Sanchez*, 689 F.2d 508, 509 n.1 (5th Cir. 1982) (government waived issue of defendant's standing to complain of stop and search by failing to raise it below). *See also Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (government's failure to raise argument constitutes waiver). *See generally United States v. Alwan*, 279 F.3d 431, 438-439 (7th Cir. 2002) (failure to raise particular theory in addressing motion to suppress evidence constitutes a waiver); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) (same). The petitioner contends that under principles articulated by this Court, the Supreme Judicial Court should not have been permitted to rely on grounds never raised in any proceeding that neither he nor the lower court had an opportunity to address. By deciding this case on an issue that was neither

raised nor preserved in any manner and in any court, the Supreme Judicial Court has clearly signaled that the waiver rules articulated by this Court will not be followed. Certiorari is appropriate in these circumstances.

Finally, although the Supreme Judicial Court found that the police had violated both the letter and the spirit of the principles set forth in *Michigan v. Summers*, by refusing to apply the remedy articulated by this Court, the Massachusetts courts have sent a clear signal that those principles will not be enforced. The state court's rejection of principles articulated by this Court affected the outcome of the petitioner's case and will no doubt affect cases of other similarly situated defendants. For those reasons, allowance of the writ would be appropriate.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

Respectfully submitted,

Michael Charros,
By his attorney,

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APPENDIX A

Supreme Judicial Court of Massachusetts
443 Mass. 752 (2005)

COMMONWEALTH
v.
Michael CHARROS (and three companion cases[1]).

Bristol. January 6, 2005. - March 31, 2005.

Present: MARSHALL, C.J., GREANEY, SPINA, COWIN, SOSMAN, & CORDY, JJ.

INDICTMENTS found and returned in the Superior Court Department on October 1, 1998.

A pretrial motion to suppress evidence was heard by *John A. Tierney*, J. and the cases were tried before *Patrick F. Brady*, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Dana Alan Curhan, Boston (*Brad Bennion* with him) for Michael Charros.

Cynthia A. Vincent, New Bedford, for Geraldine Charros.

Steven Gagne, Assistant District Attorney (*Alison R. Bancroft*, Assistant District Attorney, with him) for the Commonwealth.

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[1] Two against Geraldine Charros and one against Michael Charros.

Richard L. Goldman, Boston, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

SPINA, J. Michael Charros was convicted of trafficking in cocaine in excess of 200 grams, and trafficking within 1,000 feet of a school zone. Geraldine Charros, his wife, was convicted of a lesser included offense of trafficking in cocaine in an amount of twenty-eight grams or more but less than one hundred grams, based on a theory of joint venture. She also was convicted of a corresponding school zone violation. On appeal, the defendants argue that the search warrant for their home did not authorize officers of the New Bedford police department to stop them after they left their home and traveled approximately one mile, and that items seized as a result of their illegal arrest and statements made by Michael should have been suppressed in accordance with the requirements of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights.[2] The defendants raise other issues in these consolidated appeals, including the refusal to order discovery and the exclusion of evidence concerning the identity of an alleged government informant; claims of ineffective assistance of counsel; and a contention that Geraldine's motion for a required finding of not guilty should have been allowed. We hold that the search warrant did not authorize the stop of the defendants, but that police had an independent basis for arresting Michael. We affirm Michael's convictions, but we

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[2] We acknowledge the amicus brief on this issue filed by the Committee for Public Counsel Services.

reverse Geraldine's convictions and remand her case to the Superior Court for a new trial.

1. *Background.* The jury could have found the following facts. On August 10, 1998, officers of the New Bedford police department obtained a search warrant for the first-floor apartment at 164 Query Street in New Bedford, the residence of Michael and Geraldine Charros.[3]

After obtaining the search warrant, numerous officers in several cars positioned themselves at various locations around 164 Query Street. At approximately 5:45 P.M. a man other than Michael left the house and drove away. Shortly thereafter Michael was seen driving away in a white van. Some officers stopped the van approximately one mile away. Michael was ordered to step outside, and a patfrisk resulted in the discovery of two small paper folds containing cocaine. One fold was randomly selected for analysis and weighed 0.47 grams. It had a street value of $20 to $25. Michael was handcuffed, placed in a patrol car, and driven back to his home.

Geraldine and the couple's eight year old son were also in the van. An officer drove them in the van back to their home. Once inside their apartment both defendants were advised of the Miranda warnings and allowed to examine the search warrants. Geraldine was permitted to arrange for a relative to remove their son from the premises. She was placed in handcuffs.

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[3] They had a second warrant authorizing the search of a brown pick-up truck registered to Michael.

Detective Paul Oliveira asked Michael if he were willing to cooperate and show them where he kept the cocaine. He indicated he would, and he led the officers to a small room with a roll-top desk from which were seized a number of items, including a shoe box that contained a plastic bag with 244.68 grams of cocaine, eight small corner bags of cocaine (one was randomly selected for analysis and had a net weight of 0.42 grams), a small corner bag of nonnarcotic white powder, a bottle of Inositol powder, a folded paper packet of cocaine (its net weight was 0.26 grams), several square pieces of paper, $140 in cash, an open box of sandwich bags, a telephone pager, two keys, a triple-beam balance scale, scissors, a butter knife, a Harley Davidson brochure with slash marks on it, and letters and bills addressed to both defendants.

The officers used the keys found in the desk to unlock a strongbox and a safe in a closet off the room where the desk was located. The strongbox contained an envelope with $10,000 cash, a blue bank bag with $8,750 cash, and a white plastic bag containing 28.42 grams of cocaine. The safe contained a .22 caliber handgun and ammunition.[4]

A waste paper basket under the desk contained an empty bottle of Inositol and plastic sandwich bags with corners cut away. Inositol powder is frequently used as a cutting agent to create or

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[4] At the conclusion of all the evidence the judge allowed Michael Charros's motion for a required finding of not guilty as to a charge of unlawful possession of a firearm and a charge of unlawful possession of ammunition concerning these items.

stretch a mixture of cocaine for retail sale. Sandwich bags are frequently used in the retail sale of cocaine by placing a small amount of cocaine in a corner, tying a knot in the bag close to the corner holding the drug, then cutting away the unused portion of the bag above the knot, leaving what is known as a "corner bag" of cocaine. Corner bags usually contain a one-half gram mixture of cocaine and sell for $20 to $25 on the street. Based on opinion testimony, the items seized from the desk are not consistent with personal use of cocaine, but are consistent with items used in the sale of cocaine.

From the living room, officers seized a police-band scanner that was "on" and tuned to one of the New Bedford police department frequencies. It was capable of receiving radio communications on the frequency used by the narcotics unit. One purse containing $1,500 cash was seized from the master bedroom. It contained no identification papers. The purse Geraldine had in her possession at the time she was driven back to the apartment also was seized. It contained $821 cash.

Michael admitted to Detective Oliveira that he did not use cocaine, but had been selling it for about eight years. He said he was not a big dealer, and just sold a little "here and there" to make some money. He said that the approximately 250 grams that he had in the house would last him about one month. Michael explained that he kept the money in the safe, and not in a bank, because he owed $30,000 in child support. He also explained that the .22 caliber handgun and ammunition had belonged to his

father, and that his father recently had passed away.

Both defendants testified. Michael denied telling Detective Oliveira that he had been selling drugs for eight years. He testified that he told Oliveira that Joe Ryan had brought the box of drugs to the house for safekeeping just minutes before Michael had been arrested, and that Ryan had been selling drugs for seven or eight years. Michael testified that he never sold drugs, and that he had purchased from Joe Ryan the two paper folds of cocaine he had on his person when arrested. He also denied telling Oliveira that he owed $30,000 in child support, or that he even mentioned owing child support. There had been papers on the roll-top desk that indicated a claim in excess of $30,000 had been made against him for child support, but Geraldine testified that they had retained a lawyer and the claim was reduced significantly.

Geraldine testified that Michael's father had lived with them from January, 1997, until his death in March, 1998. He suffered many medical complications related to diabetes. A leg had been amputated, he was confined to a wheelchair, and he required dialysis. Michael was his father's caretaker during the day, and Geraldine helped out at night by preparing his meals. Because her father-in-law was on a "renal diet," his food portions, especially meat, had to be weighed with precision. The triple-beam scale, which had been kept in the pantry when he was alive, was used for this purpose, and no other. She extended his meals by sprinkling Inositol over the food. She would prepare his meals in advance and set them

aside in plastic sandwich bags. After the father died, the scale was stored in the closet, and the Inositol and sandwich bags were stored in the roll-top desk. The scale had not been used after the father's death because she dropped and broke it when placing it in the closet. The police removed it from the closet and placed it on the desk during the search of her apartment.

Geraldine also explained uses for other items that had been offered by the Commonwealth as paraphernalia used in the drug trade. The pager was hers, and was used to reach Michael at a time when their child frequently became ill at school. She testified that she used the butter knife as a letter opener, and that she attended to the family bills at the roll-top desk. The scratches on the Harley Davidson brochure were the result of Michael's cutting Harley Davidson emblems from the brochure and laminating them onto magnets.

The police scanner belonged to the father, who had listened to it constantly until his death. The father's monthly pension checks, which totalled approximately $1,100, went to his care, and to compensate Michael for giving up his job to serve as his father's caretaker. The $10,000 found in an envelope in the strongbox was money that the father had saved. As for the $8,750 in the blue bank bag, $7,000 were proceeds of two life insurance policies the father had left to the defendants, $1,100 was money Geraldine's employer had reimbursed her for a short term loan she had made, and the rest was "house money" Geraldine had put aside.

Geraldine testified that she made short-term loans to her employer, a trucking company, to help keep the company operating. The company was in bankruptcy, and she used her credit cards to pay for current company expenses. The company would then reimburse her and record the payment on its books as "toll money." Her motive for helping in this manner was to build up a good personal credit rating which she could someday use to obtain a mortgage to purchase a home. She had twenty-six credit cards, all in good standing.

She explained that the $821 in the purse she had at the time of her arrest consisted of $800 that was ready to be used to meet her employer's needs, and she had taken $21 from the strongbox just before they were stopped by police. It was to have been used to buy supper. The $1,500 in her purse in the master bedroom was a reimbursement from her employer.

When Michael's father died, Michael became depressed. He started drinking alcohol to excess, and he resumed the use of cocaine after a period of abstention of approximately four years. This became a source of marital problems. Michael obtained his cocaine from Joe Ryan. Ryan appeared at their apartment at 5:30 P.M. on August 10, 1998. He had a cardboard box (the shoe box with the 244.68 grams of cocaine) which he asked Michael to hold for him until the next day because he had "something going down with the cops." Michael told Ryan he did not want anything to do with it, but Ryan threatened him. Ryan placed the box on the roll-top desk. Ryan also discarded a bag of trash (containing the

empty Inositol bottle and the sandwich bags with corners cut out) in the waste basket under the roll-top desk.

Michael left the room for a short time while Ryan used their telephone. When he returned, Ryan had the keys to the strongbox and the safe in his hand. Two weeks earlier, Ryan had seen Michael retrieve the keys and open the strongbox to get money to buy cocaine. Both Michael and Geraldine testified they had never seen the white plastic bag containing 28.42 grams of cocaine that police seized from the strongbox. Geraldine testified that when she opened the strongbox shortly before Ryan arrived on August 10, to get $20 for supper, the bag of cocaine was not in the strongbox.

Michael and his sister, Linda, both testified about threats that Ryan had communicated to them in late winter and spring of 1999 about what he would do to Michael if Michael continued to accuse Ryan in court. Ryan made it known that the source of his information about Michael's statements had been Detective Oliveira.

2. *Required findings of not guilty.* Geraldine claims error in the denial of her motion for required findings of not guilty at the close of the Commonwealth's evidence. She argues specifically that the Commonwealth failed to prove that she acted as a joint venturer. We review this claim under the standard of *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), to determine whether the evidence, in its light most favorable to the Commonwealth, is sufficient to permit any rational jury to convict. In order to

succeed on a theory of joint venture, the Commonwealth must prove that the defendant was "(1) present at the scene of the crime, (2) with knowledge that another intends to commit the crime or with intent to commit a crime, and (3) by agreement is willing and available to help the other if necessary." *Commonwealth v. Bianco*, 388 Mass. 358, 366, 446 N.E.2d 1041, *S.C.*, 390 Mass. 254, 454 N.E.2d 901 (1983).

A jury could have inferred that Geraldine was knowingly present in the apartment, where Michael trafficked in cocaine. A large volume of cocaine and paraphernalia for cutting, weighing, and packaging cocaine for distribution were kept openly, on a desk to which she had access. Her mail was kept in the same place. The evidence warranted a finding that, in the circumstances, she had to know that a substantial cocaine distribution operation was being run out of her home. With respect to the third element of joint venture, a jury reasonably could infer that Michael's cocaine trafficking operation generated large amounts of cash, and that Geraldine assisted in the management or concealment of the proceeds of that operation by holding proceeds in her purses. The motion for required findings was properly denied.

3. *Suppression issues.* The search warrant issued at 2:15 P.M. on August 10, 1998. The motion judge found that the officers set up surveillance of the premises at 164 Query Street sometime between 5:30 and 6 P.M. that evening. Their intention was to wait for Michael to leave the premises and then stop him within a few blocks, that is, as soon as he was out of view from

his home. They believed, based on training and experience, that this was the safer course, and that evidence possibly could be destroyed by someone inside the house if the defendants were stopped in front of the house. The judge accepted the officers' concerns, and he found that the ability of the officers to stop Michael's van before it traveled nearly one mile was affected by Query Street being a one-way thoroughfare. Relying on *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the judge concluded that the officers did not act unreasonably, within the meaning of the Fourth Amendment.

The defendants argue the officers' authority under the warrant to detain them exists only if they are on the premises at the time police conduct the search.[5] They further argue that the officers had no authority to seize them one mile from their home, return them, and detain them inside while officers conducted a search. Even if their detention were permitted under the Fourth Amendment, they maintain that it is not acceptable under the more protective guarantee of art. 14, which the motion judge did not address.

a. *Authority under the warrant.* The Supreme Court held in *Michigan v. Summers, supra* at 705, 101 S.Ct. 2587, that, "for Fourth Amendment purposes ... a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of

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[5] Because the defendants were residents of the premises, we are not concerned with the authority under this warrant to search any person present. See *Commonwealth v. Catanzaro*, 441 Mass. 46, 51-52 n. 10, 57- 58 & n. 16, 803 N.E.2d 287 (2004).

the premises while a proper search is conducted." In that case the Court approved the seizure of an occupant as he was descending the front steps of his residence, the house to be searched. He was returned and detained inside while officers searched his house. The Court reasoned that "limited intrusions" on personal liberty incident to a search may be justified under the Fourth Amendment on less than probable cause by "substantial law enforcement interests ... so long as police have an articulable basis for suspecting criminal activity." *Id.* at 699, 101 S.Ct. 2587.

The Court identified three law enforcement interests that justify a detention on less than probable cause when officers execute a search warrant. The first is "preventing flight in the event that incriminating evidence is found." *Id.* at 702, 101 S.Ct. 2587. The second interest is "minimizing the risk of harm to the officers. Although no special danger to the police [need be shown], the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." (Footnote omitted.) *Id.* at 702-703, 101 S.Ct. 2587. The third law enforcement interest involves "the orderly completion of the search [that] may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand." *Id.* at 703, 101 S.Ct. 2587.

With respect to the requirement that officers have an "articulable and individualized suspicion" of criminal activity, the Court said this requirement is satisfied, at least as to occupants, by circumstances underlying the issuance of the warrant, namely, a judicial officer's finding of probable cause to believe that a crime is being committed in the house. *Id.* at 703, 101 S.Ct. 2587.

The Court noted that the detention of a person incident to a search of his home is but an "incremental intrusion on [his] personal liberty," *id.* at 703, 101 S.Ct. 2587, when compared to the "substantial invasion of [his] privacy" authorized by the warrant for his home. *Id.* at 701, 101 S.Ct. 2587. The Court further observed that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention. Moreover, because the detention in this case was in the respondent's own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." (Footnotes omitted.) *Id.* at 701-702, 101 S.Ct. 2587. The Court concluded that "the detention of this respondent was 'substantially less intrusive' than an arrest." *Id.* at 702, 101 S.Ct. 2587.

The present case has little in common with *Michigan v. Summers, supra.* The seizure of these defendants did not occur in the privacy of their

home, but at a location one mile away with no connection to the premises to be searched. Moreover, it occurred in spectacular fashion by driving a police car across their path to cut off their forward progress while they were driving on one of the busiest streets in New Bedford during evening rush-hour traffic. The seizure produced all the indignity of an arrest in full view of the public. This was hardly an "incremental intrusion" on personal liberty, but a significant deprivation of liberty far beyond what was contemplated in *Michigan v. Summers*, *supra* at 703, 101 S.Ct. 2587. The circumstances of the seizure of the defendants also had the palpable potential for exploitation by the officers, who otherwise had no authority to search the van in which the defendants were traveling. See *id.* at 701, 101 S.Ct. 2587.

Two of the three interests of law enforcement identified by the Supreme Court that arise during the execution of search warrants did not exist in this case. Once the defendants had left their home, unaware of the existence of the warrant, the officers had no interest in preventing their flight from the search site during the search or minimizing harm the defendants might cause during a search. Other courts that have considered this issue under the Fourth Amendment have reached a similar conclusion. See *United States v. Edwards*, 103 F.3d 90 (10th Cir.1996) (defendant seized three blocks from search site and detained at point of seizure while search completed); *United States v. Sherrill*, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048, 115 S.Ct. 647, 130 L.Ed.2d 552 (1994) (defendant seized one block from search site); *State v. Crank*,

212 Ga.App. 246, 441 S.E.2d 531 (1994) (defendant seized two to three miles from search site); *State v. Ruoho*, 685 N.W.2d 451 (Minn.Ct.App.2004) (defendant seized one-half mile from search site). The Supreme Court of Pennsylvania has reached a similar conclusion under art. 1, § 8, of the Pennsylvania Constitution. See *Commonwealth v. Graziano-Constantino*, 553 Pa. 150, 718 A.2d 746 (1998) (defendant seized two and one-half miles from search site). With respect to the third law enforcement interest recognized under *Michigan v. Summers*, *supra* at 703, 101 S.Ct. 2587, the orderly execution of the warrant, the officers could have ensured the presence of the defendants by executing the warrant earlier, when they knew the defendants were home, or they could have waited until their return. The officers had other viable alternatives.

The Commonwealth, relying on *Commonwealth v. Catanzaro*, 441 Mass. 46, 803 N.E.2d 287 (2004), and *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir.1991), cert. denied, 502 U.S. 1093, 112 S.Ct. 1166, 117 L.Ed.2d 413 (1992), argues that the rule in *Michigan v. Summers*, *supra*, does not depend on the geographic proximity of the seizure of an occupant to his residence (the search site), but rather on the reasonableness of police performance, that is, whether officers seized the occupant as soon as practicable after his departure from his residence. Those cases are distinguishable.

In *Commonwealth v. Catanzaro*, *supra*, we held that it was reasonable under the Fourth Amendment and art. 14 to stop an occupant of an

apartment to be searched as she was walking down the driveway fifty to seventy feet from her apartment building. She was stopped as soon as reasonably practicable on leaving, and there was a nexus between the place where the stop occurred and the premises covered by the warrant. In those circumstances, the stop was merely an incremental intrusion beyond what had been authorized by the warrant. *Id.* at 57, 803 N.E.2d 287. Here, there was no connection between the place of seizure and the premises to be searched, and the defendants were stopped on a public street, away from their home.

In *United States v. Cochran, supra,* there were special circumstances supported by specific facts that do not exist here. The defendant there was believed to carry a firearm at all times, and the interior of his residence was protected by a guard dog. Officers decided to stop him as he was driving off his property and request his assistance in entering his home. The defendant was stopped as soon as practicable, on a public road a short distance from his home. The court concluded that in the circumstances the initial stop was valid. The purpose and scope of the initial stop were broadened by the defendant's conduct as police approached his car, leading to searches of the car that were justified under different principles. In the case before us there were no such exigencies, and the officers had planned in advance to stop the defendants two blocks from their home and take them back.

It is important to recognize the need of law enforcement officers to "exercise unquestioned command" of a search site and detain persons on

the premises in the interest of the safety of all involved, and to prevent the destruction of evidence. *Michigan v. Summers, supra* at 702-703, 101 S.Ct. 2587. However, this authority is incidental to, and exists contemporaneously with, the execution of the warrant. It arises from necessity, that is, from the need to control the inherent volatility produced by the search environment. It requires no special showing. *Id.* To conclude that such authority arises in anticipation of the execution of the warrant, as the Commonwealth suggests, requires a distorted reading of the *Summers* case that effectively would eliminate any meaningful relation between the place of the seizure and the premises to be searched, and it would give officers authority to act in anticipation of the execution of a warrant comparable to making an arrest without having to meet the requirements of an arrest. Moreover, if officers believe the element of surprise is needed to conduct a search safely, they may apply for a "no-knock" warrant and make the requisite showing of probable cause to believe that announcing themselves in advance of execution of the warrant would jeopardize their safety or result in the destruction of evidence (one of the three law enforcement interests identified in *Michigan v. Summers, supra* at 702-703, 101 S.Ct. 2587). See *Commonwealth v. Scalise*, 387 Mass. 413, 418, 421, 439 N.E.2d 818 (1982). A no-knock warrant was not sought here. The authority to seize and detain an occupant incident to a search makes sense only if it is seen as arising contemporaneously with the officers' arrival at premises to execute the warrant, and not in preparation for the execution of that warrant.

For the foregoing reasons we conclude that, for purposes of the Fourth Amendment, the officers had no authority under the search warrant to seize the defendants one mile from their home, or to return and detain them in their home while the search took place. Because we apply the same general analysis to a claim that an off-premises seizure of an occupant incident to a search violates art. 14, see *Commonwealth v. Catanzaro*, *supra* at 54-57, 803 N.E.2d 287, we reach the same conclusion as a separate, adequate, and independent ground under art. 14. This case does not provide the opportunity for us to decide whether art. 14 affords greater protection than the Fourth Amendment with respect to off-premises seizures of occupants incident to the execution of a search warrant.

b. *Probable cause to arrest.* The conclusion we reach with respect to the officers' authority under the warrant does not necessarily mean that the order denying suppression must be vacated. The defendants argue that the officers had no other justification for stopping and detaining them. We disagree, as to Michael. The affidavit in support of the application for the search warrant indicates that a confidential reliable informant, see *Commonwealth v. Crawford*, 417 Mass. 40, 628 N.E.2d 4 (1994), purchased cocaine from Michael Charros within fifteen days of the date of the application for the warrant. The defendants do not challenge the validity of the search warrant, which was issued based, in part, on this information. This information constitutes probable cause to believe that Michael had committed a felony as proscribed by G.L. c. 94C, § 32A (*a*). In addition to its support for the

probable cause requirement for the issuance of the search warrant, this evidence satisfies the probable cause requirement for an arrest. See *Gerstein v. Pugh*, 420 U.S. 103, 111-112, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and cases cited. Consequently, the officers had the authority to arrest Michael without a warrant. See *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Commonwealth v. Holmes*, 344 Mass. 524, 183 N.E.2d 279 (1962). The initial stop of Michael was valid, as it was based on probable cause to arrest,[6] and his motion to suppress was properly denied. However, there was no probable cause to justify any arrest of Geraldine. Her motion to suppress the $821 cash found in her purse should have been allowed.

c. *Harmless error.* We must determine whether the erroneous admission of evidence of the $821 found in the purse Geraldine was carrying requires reversal of her convictions. Constitutional errors that have been preserved are reviewed to determine whether they are harmless beyond a reasonable doubt. See *Commonwealth v. Vinnie*, 428 Mass. 161, 163, 698 N.E.2d 896, cert. denied, 525 U.S. 1007, 119 S.Ct. 523, 142 L.Ed.2d 434 (1998). Under this standard, the burden shifts to the Commonwealth, see *Commonwealth v. MacDonald (No. 1)*, 368 Mass. 395, 399, 333 N.E.2d 189 (1975), to show that the wrongfully admitted

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[6] "Although to justify the seizure neither the Commonwealth nor the judge relied on this theory, the general rule is that, if the evidence is admissible, 'it is of no consequence whether the reason assigned by the judge was accurate.'" *Commonwealth v. Signorine*, 404 Mass. 400, 403 n. 1, 535 N.E.2d 601 (1989), quoting *Mathews v. Orlandella*, 320 Mass. 386, 388, 69 N.E.2d 571 (1946).

evidence did not contribute to the verdicts. See *Commonwealth v. Peixoto*, 430 Mass. 654, 660, 722 N.E.2d 470 (2000). The Commonwealth has not addressed this issue in its brief.

We begin with the observation that it is difficult on this record to weigh what was tainted and what was not tainted by the wrongful admission of the money in the purse Geraldine had in her possession at the time of the initial stop. This includes Geraldine's testimony. Geraldine offered an explanation at trial for the $821 in her purse, thereby admitting possession of the item that should have been suppressed. Some courts hold that such voluntary testimony concerning the item that should have been suppressed renders any error harmless. See *Muff v. State*, 254 Ga. 45, 326 S.E.2d 454 (1985); *Commonwealth v. Hart*, 471 Pa. 271, 370 A.2d 298 (1977). However, at least one commentator has suggested that this approach, which places a defendant in a "Catch-22" position, is little more than a manipulation of the harmless error rule, and a defendant's testimony explaining illegally admitted evidence should be considered tainted. See 6 W.R. LaFave, Search and Seizure § 11.7(f), at 482-484 (4th ed.2004). In an early case involving the exclusionary rule, this court, with no analysis, disregarded the testimony of a defense witness offered on the subject of illegally admitted physical evidence. See *Commonwealth v. McCleery*, 345 Mass. 151, 186 N.E.2d 469 (1962). Moreover, the Supreme Court has said that one of the "cumulative prejudicial effect[s]" of the admission of physical evidence that should have been suppressed includes the damaging admissions made by a defendant in testimony

offered to explain the wrongfully admitted evidence. See *Fahy v. Connecticut*, 375 U.S. 85, 91, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

Geraldine's testimony, while apparently helpful to her on the question of her connection to the 244 gram bag of cocaine, as well as the broken condition of the triple-beam scale, may have had the opposite effect as to the twenty-eight gram bag of cocaine in the strong box, which she admitted opening to get $20 just before her arrest. This $20 is a portion of the evidence that should have been excluded. It is particularly significant because the Commonwealth contends it is the proceeds of the crime of selling cocaine. Geraldine's explanation of where, when and why she obtained it established that she had access to the locked strong box used to conceal the twenty-eight grams of cocaine, which appears to have been the basis for her conviction. It is virtually impossible to say, on this record, whether Geraldine would have testified had the evidence been suppressed. However, we think the evidence of the $821 and Geraldine's testimony were at least as damaging as the few pieces of mail and the purse with $1,500 (but no identification), the only other evidence connecting her to the drugs.

The case against Geraldine was not strong. We are not confident that the admission of the $821 found in her purse, together with her testimony explaining the source of at least some of that money, did not contribute to the verdicts. She is therefore entitled to a new trial.[7]

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[7] Because of the conclusion we reach on this issue, we need not address the remaining issues raised in her brief.

4. *Disclosure of confidential informant.* There is no merit to Michael Charros's claim of error in the judge's failure to order disclosure of the identity of the confidential informant "CI-1" described in the affidavit in support of the application for the search warrant. Michael filed a motion for disclosure of CI-1's identity, but he did not press the motion. The issue is waived, see *Commonwealth v. Padilla*, 42 Mass.App.Ct. 67, 71, 674 N.E.2d 1102 (1997), but reviewable for a substantial risk of a miscarriage of justice.

Michael was trying to show that "CI-1" was Joe Ryan, and that Ryan was acting with knowledge of New Bedford police when he allegedly arrived at the Charros home on August 10, 1998, with 244 grams of cocaine. Instead of pressing the motion for disclosure, Michael pursued an alternative course by filing a motion to reopen the hearing on the motion to suppress. At a hearing on the motion to reopen, which had been preceded by discovery of police reports concerning Ryan, the detectives testified that they did not know Joe Ryan on August 10, 1998. The judge credited that testimony.

Michael was permitted discovery concerning Joe Ryan, as well as a hearing on his motion to reopen. He claims no error relating to the course of that hearing, e.g., that his questions were unfairly limited. Once it became apparent that Ryan could not have been "CI-1," Michael had no further interest in the identity of "CI-1." He has failed to show any error in the judge's decision to credit the testimony of the officers. Although he did not learn the identity of "CI-1," Michael nevertheless was able to present his defense that

Ryan delivered the drugs to his home, and he offered Ryan's purported explanation that he had "something going down with the police." There has been no showing of a substantial risk of a miscarriage of justice.

5. *Statement against penal interest.* There is no merit to Michael's claim of error in the exclusion of statements attributable to Ryan to the effect that he apologized to Michael's sister and to Geraldine Charros for what he did, but he had to solve his own problems with the police. The statements were properly excluded as hearsay, and they did not qualify as statements against penal interest. There had been no showing that Ryan was not available, and the statement had not been corroborated by circumstances clearly indicating trustworthiness. See *Commonwealth v. Drew*, 397 Mass. 65, 73, 489 N.E.2d 1233 (1986), quoting *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir.1978).

Both defendants testified that they saw Ryan the morning of their trial when he drove by the court house. He was, therefore, not unavailable. He was not called to testify, and unavailability due to the possibility of a claim of privilege against self-incrimination will not be presumed. See *Commonwealth v. Lopera*, 42 Mass.App.Ct. 133, 137 n. 3, 674 N.E.2d 1340 (1997).

The primary corroboration offered for the accuracy of Ryan's statements is the testimony of Michael and Geraldine Charros that Ryan delivered the drugs to their home on August 10, 1998, because of some difficulty he was having with the police, and that the police also saw a man, whom the defendants contend was Ryan,

leaving the house shortly before the defendants. However, the police could not say that the man they saw leaving was Ryan, or that he came from the defendants' apartment. Moreover, even if it were Ryan, the statement attributable to Ryan does not support Michael's assertion that Ryan was acting with knowledge of the police. There is no evidence that police were aware of Ryan's activities as a drug dealer until about July, 1999, nearly one year after the arrests in this case. This does not constitute circumstances clearly indicating trustworthiness of statements made to a defendant and his sister, both of whom have a strong interest in the outcome of the case. There was no error.

6. *Ineffective assistance.* Michael contends that his attorney was ineffective because he abandoned the theory of the defense in his closing.

Defense counsel had tried the case on the theory that Joe Ryan and the police had "set Michael up." This necessarily meant that the police were lying at trial. Although he did not expressly accuse them of lying, and at times said he was not accusing them of lying, he unmistakably implied as much, and no reasonable juror could have interpreted counsel's closing as an abandonment of the attorney's very aggressive and well managed trial strategy.

Michael's Charros's convictions are affirmed. Geraldine Charros's convictions are reversed, the verdicts set aside, and her case is remanded to the Superior court for a new trial.

So ordered.

APPENDIX B

SEARCH WARRANT
G.L. c. 276, §§ 1-7

TRIAL COURT OF MASSACHUSETTS
Bristol
New Bedford
SEARCH WARRANT DOCKET NUMBER

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
- ☐ is intended for use or has been used as the means of committing a crime.
- ☐ Has been concealed to prevent a crime from being discovered.
- ☒ is unlawfully possessed or concealed for an unlawful purpose.
- ☐ is evidence of a crime or is evidence of criminal activity.
- ☒ other (*specify*) Cocaine, a class B controlled substance as defined in MGL

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of Chapter 94C to include specifically COCAINE. All materials, products, and equipment of any kind, which are used, or intended for use, in manufacturing, compounding, processing, delivering, dispensing, importing or exporting, of any controlled substances in violation of Chapter 94C. All books and records, including magnetic storage devices, tapes and computer equipment, software and all monies used or intended for use in procurement, manufacture, compounding, processing, delivery, or distribution of any controlled substance, in violation of Chapter 94C, including all monies which are believed to be the proceeds of sales, or distribution of any controlled substance.

☒ at:

164 Query Street first floor apartment in New Bedford, Massachusetts. This is a two story structure that is gray with white trim. The number 164 is on the front of the house.

Which is occupied by and/or in the possession of: Michael Charros DOB:8-29-56
SS#017-48-9236
Geraldine Charros DOB:8-26-61
SS#015-46-8238

☒ on the person or in the possession of:

Same as above.

You ☐ are ☒ are not also authorized to conduct the search at any time during the night.

You ☐ are ☒ are not also authorized to enter the premises without announcement.

You ☒ are ☐ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the Bristol Division of the New Bedford District Court Department.

DATE ISSUED 8-10-98 2:15 PM

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

x Ilene M. Adams

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

Ilene M. Adams

FIRST OR ADMINISTRATIVE JUSTICE

WITNESS: Aileen H. Belford

APPLICATION FOR SEARCH WARRANT
G.L. c. 276, §§ 1-7

TRIAL COURT OF MASSACHUSETTS
Bristol
New Bedford
SEARCH WARRANT DOCKET NUMBER

NAME OF APPLICANT

Det. Paul J. Oliveira

POSITION OF APPLICANT

Police Officer – City of New Bedford

I, the undersigned **APPLICANT**, being duly sworn, depose and say that:

1. I have the following information based upon the attached affidavit(s), consisting of a total of 4 pages, which is (are) incorporated herein by reference.

2. Based upon this information, there is **PROBABLE CAUSE** to believe that the property described below:

   ☐ has been stolen, embezzled, or obtained by false pretenses.
   ☐ is intended for use or has been used as the means of committing a crime.
   ☐ Has been concealed to prevent a crime from being discovered.
   ☒ is unlawfully possessed or concealed for an unlawful purpose.
   ☐ is evidence of a crime or is evidence of criminal activity.

☒ other (*specify*) Cocaine, a class B controlled substance as defined in MGL

3. I am seeking the issuance of a warrant to search for the following property (*describe the property to be searched for as particularly as possible*):

All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of Chapter 94C to include specifically COCAINE. All materials, products, and equipment of any kind, which are used, or intended for use, in manufacturing, compounding, processing, delivering, dispensing, importing or exporting, of any controlled substances in violation of Chapter 94C. All books and records, including magnetic storage devices, tapes and computer equipment, software and all monies used or intended for use in procurement, manufacture, compounding, processing, delivery, or distribution of any controlled substance, in violation of Chapter 94C, including all monies which are believed to be the proceeds of sales, or distribution of any controlled substance.

4. Based upon this information, there is also probable cause to believe that the property may be found (*check as many as apply*):
☒ at (*identify the exact location or description of the place(s) to be searched*):

164 Query Street first floor apartment in New Bedford, Massachusetts. This is a two story structure that is gray with white trim. The number 164 is on the front of the house.

Which is occupied by and/or in the possession of: Michael Charros DOB:8-29-56
SS#017-48-9236
Geraldine Charros DOB:8-26-61
SS#015-46-8238

☒ on the person or in the possession of:

Same as above.

☒ on any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

THEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

I ☐ have previously submitted the same application

I ☒ have not previously submitted the same application.

PRINTED NAME OF APPLICANT

Det. Paul J. Oliveira

SIGNED UNDER THE PENALTIES OF PERJURY

x Det. Paul J. Oliveira

SWORN AND SUBSCRIBED TO BEFORE

x Ilene M. Adams
Signature of Justice, Clerk-Magistrate

8-10-98 2:15 pm
DATE

PAGE# 1

AFFIDAVIT

In Support Of Application For Search Warrant

I, PAUL J. OLIVEIRA, being duly sworn depose and say that I am a Police Officer in the City of New Bedford. I have been employed in this capacity for over five years. I am currently assigned as a Detective in the Organized Crime Intelligence Bureau which specializes in narcotics investigations. I have conducted numerous investigations into violations of the Controlled Substance Act resulting in numerous arrests and convictions for various narcotics violations.

During the course of my duties I have conducted undercover surveillance during narcotics investigations. I have also participated in the execution of numerous narcotics search warrants. I have also cultivated information from numerous confidential informants as well as drug distributors and drug users who have been arrested in possession of controlled substances. I have also received training in the identification of controlled substances from the Massachusetts Criminal Justice Training Council as well as training from other Detectives in the narcotics unit in the identification and pricing of various quantities of controlled substances.

As a result of my training and experience I am familiar with various controlled substances, how they are packaged and approximate street value for these controlled substances. I am also familiar with the common tactics and jargon used by users and distributors of controlled substances.

During the week of July 26, 1998 and up until the present time this affiant has been speaking with a confidential and reliable informant regarding a male by the name of Michael Charros selling large quantities of cocaine out of his first floor apartment of 164 Query Street in New Bedford, Massachusetts. For the purpose of this affidavit this informant will be referred to as CI-1.

CI-1 has proven to be accurate and reliable in the past by providing information which led to the arrest of John Fortes (12-15-74) and the seizure of 10 grams of cocaine, 5 bags of marijuana, a 357 handgun and $6,343.00. As a result of information supplied from CI-1, search warrants were executed at 715 Summer Street and 344 Ashley Boulevard in New Bedford, Massachusetts on May 31, 1997 which resulted in the above mentioned arrest and seizure. Fortes was convicted as a result of this case on July 7, 1998 in New Bedford Third District Court.

_____

Printed Names of Affiant
Det. Paul J. Oliveira

Signed Under The Penalties of Perjury
X Det. Paul J. Oliveira

Sworn and Subscribed To Before
X Ilene M. Adams
Signature of Justice, Clerk, Assistant Clerk

8-10-98
Date

AFFIDAVIT

In Support Of Application For Search Warrant

CI-1 admits being a user of marijuana and cocaine and is familiar with the common street terminology used to refer to these drugs. CI-1 states that it is also familiar with the methods used to prepare and package these drugs for the purpose of street sales and the amounts that are charged for them.

CI-1 states that during the week of July 26, 1998 and up until the present time it has been inside of the first floor apartment of 164 Query Street and purchased cocaine from a male by the name of Michael Charros. CI-1 describes Charros as a tall and skinny male with a thick mustache and about forty years. CI-1 states that Charros lives in the apartment with his wife and two small children. CI-1 also informed me that on more than one occasion it has purchased cocaine from the target inside of the apartment in the presence of the target's wife. For the purpose of this affidavit Michael Charros will be referred to as the target.

CI-1 states that the target has also delivered cocaine to it in a brown pick up truck bearing Massachusetts registration 465-VCZ.

During the week of July 26, 1998 this affiant spoke with Detective Lt. Mel Wotton who informed me that he had been speaking with a first time informant over the last couple of weeks

regarding Michael Charros selling large quantities of cocaine. For the purpose of this affidavit this first time informant will be referred to as CI-2.

Detective Lt. Mel Wotton informed me that CI-2 admits being very familiar with cocaine and the street terminology used to refer to it. CI-2 also admits being familiar with the way cocaine is packaged for the purpose of street level sales and the prices that are charged for it.

Detective Lt. Mel Wotton states that CI-2 is aware that Charros is a major cocaine supplier of the city of New Bedford. CI-2 describes Charros as a tall, white male with a mustache and about forty years old. CI-2 states that the target lives in the first floor apartment of 164 Query Street in New Bedford, Massachusetts with his wife and two children. CI-2 also states that it is aware that the target does not work and owns a brown pick up truck bearing Massachusetts registration 465-VCZ and a

_____

Printed Names of Affiant
Det. Paul J. Oliveira

Signed Under The Penalties of Perjury
X Det. Paul J. Oliveira

Sworn and Subscribed To Before
X Ilene M. Adams
Signature of Justice, Clerk, Assistant Clerk

8-10-98
Date

AFFIDAVIT

In Support Of Application For Search Warrant

white and blue van bearing Massachusetts registration 864-XCR and a motorcycle. CI-2 states that the brown pick up truck is always parked in front of the house and the van is parked in the driveway of the house.

CI-2 informed Detective Lt. Mel Wotton that the target usually makes deliveries and does not let many people come to the house to purchase cocaine. CI-2 states that the target uses the brown pick up truck bearing Massachusetts registration 465-VCZ to deliver the cocaine and he always delivers the cocaine right to the customers house.

This affiant learned through the New Bedford Police Central Records Bureau that the registration plate (465-VCZ) on the truck is listed to Geraldine Charros of 164 Query Street and the vehicle listing is a 1988 brown, GMC pick up truck. I also learned that the registration plate (864-XCR) on the van is listed to Michael Charros of 164 Query Street and the vehicle listed is a 1990 white and blue Chevy Sports Van.

During surveillance conducted outside of 164 Query Street this affiant has observed a male fitting the description of the target entering and exiting the house on a number of occasions. This affiant has also observed this same male entering the brown pick up truck bearing Massachusetts registration 465-VCZ, which I always observed

parked directly in front of the house. During this surveillance I observed the blue and white van parked in the driveway of the house. On a few occasions during this surveillance this affiant has followed the target in the pick up truck from 164 Query Street to different houses where he was only in the house for a few minutes before he exited and drove back to 164 Query Street.

CI-1 states that it has been inside of the target's apartment within the last 72 hours at which time it has purchased cocaine and observed more cocaine inside the apartment.

Based on the above information, this affiant is requesting that search warrants be issued for the first floor apartment of 164 Query Street in New Bedford, Massachusetts and also for the 1988 GMC pick up truck bearing Massachusetts registration 465-VCZ.

This affiant is requesting that ALL PERSON PRESENT warrants be issued for the following reasons as well as the reasons listed

Printed Names of Affiant
Det. Paul J. Oliveira

Signed Under The Penalties of Perjury
X Det. Paul J. Oliveira

Sworn and Subscribed To Before
X Ilene M. Adams
Signature of Justice, Clerk, Assistant Clerk

8-10-98
Date

PAGE# 4

AFFIDAVIT

In Support Of Application For Search Warrant

in this affidavit. Being that cocaine is commonly packaged in plastic baggies it can be easily be hidden on a persons body and\or clothing. The ALL PERSON PRESENT warrant would assist investigating officers to be able to search anyone who might be present in the apartment and vehicle at the time of the execution of the search warrants.

Printed Names of Affiant
Det. Paul J. Oliveira

Signed Under The Penalties of Perjury
X Det. Paul J. Oliveira

Sworn and Subscribed To Before
X Ilene M. Adams
Signature of Justice, Clerk, Assistant Clerk

8-10-98
Date

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS. SUPERIOR COURT
NOS. 9873CR0331A-E &
9873CR0332

COMMONWEALTH

V.

MICHAEL CHARROS AND
GERALDINE CHARROS

FILED
DEC 21 1998
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

DEFENDANTS' MOTION TO SUPPRESS SEARCH AND SEIZURE (WITHOUT WARRANT) AS WELL AS STATEMENTS ATTRIBUTED TO DEFENDANT, MICHAEL CHARROS

(Statement of Reasons and Supporting Authorities Included)

The defendants in the above-captioned case hereby move this Court to suppress any and all items seized emanating from a warrantless arrest, personal search and seizure on August 10, 1998 by members of the New Bedford Police Department at or near the intersection of Acushnet Avenue and Covell Streets, New Bedford, MA and continuing into the house located at 164 Query Street (first floor). The items to be suppressed are set forth on the attached compilation of all evidence seized. The Defendant, Michael Charros also moves to suppress any alleged statements that may have been attributed to him by members of the New Bedford Police Department.

The alleged physical evidence was seized and statements taken were obtained under circumstances that violated Defendants' rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Articles Twelve, Thirteen, and Fourteen of the Massachusetts Declaration of Rights, G.L. c. 276, Sec. 1 and G.L. c. 276, Sec. 33A.

Grounds for the motion are as follows:

1.) The search of the defendants' persons, motor vehicle, and home at 164 Query Street (first floor), as well as the seizure of property as alleged evidence therefrom had no underlying basis in probable cause. See **Commonwealth v. Upton**, 394 Mass. 363 (1985); **Commonwealth v. Preston**, 27 Mass. App. Ct. 16 (1989).

2.) Alleged evidence seized was not in plain view. See **Commonwealth v. Sergienko**, 399 Mass. 291, 293-295 (1987).

3.) The search was not a lawful inventory search. See **Commonwealth v. Bishop**, 402 Mass. 499 (1988).

4.) The search was not a lawful search incident to arrest. See **Commonwealth v. Stafford**, 18 Mass. App. 964 (1984).

5.) There was no consent to the search of the defendants' persons, their motor vehicle, or their home. See **Commonwealth v. Cantalupo**, 380 Mass. 173 (1980).

6.) The arrest of the defendants was effectuated without any underlying basis is probable cause. See **Commonwealth v. Sanderson**, 398 Mass. 761 (1986).

7.) Law enforcement authorities did not have reasonable suspicion necessary to justify a threshold inquiry/stop and frisk/Terry-stop. See **Terry v. Ohio**, 392 U.S. 1, 30 (1968); **Commonwealth v. Almeida**, 373 Mass. 266 (1977).

8.) The scope of the search went beyond the allowable scope of a threshold inquiry/stop and frisk/Terry-stop. **Id.**

9.) Alleged statements attributed to defendant, Michael Charros were taken by law enforcement personnel under circumstances that violated his privilege against self incrimination and associated rights. See **Miranda v. Arizona**, 384 U.S. 436, 475-476 (1966); **Commonwealth v. Riveiro**, 393 Mass. 224, 228 (1984).

10.) Alleged statements . . . Michael Charros were obtained by law enforcement personnel under circumstances that constituted "the fruit of the poisonous tree." See **Wong Sun v. U.S.**, 371 U.S. 471 (1963); **Commonwealth v. O'Connor**, 21 Mass. App. Ct. 404, 406 (1986).

11.) Alleged statements attributed to the defendant, Michael Charros were not obtained after a free, willing, voluntary and intelligent waiver of his rights. See **Commonwealth v. Hosey**, 368 Mass. 571, 574 (1975);

Commonwealth v. Tavares, 385 Mass. 140 (1982).

12.) The evidence obtained from defendants' home at 164 Query Street (first floor) and its attribution to these defendants also constitute the "fruit[s] of the poisonous tree". **Wong Sun v. U.S.**, 371 U.S. 471 (1963); **Commonwealth v. Pietrass**, 392 Mass. 892 (1984).

WHEREFORE, the defendants request the present motion be allowed after hearing.

Respectfully submitted,
MICHAEL CHARROS AND
GERALDINE CHARROS
By their attorneys

/s/_____
Theodore A. Barone
SULLIVAN LARGEY & BARONE
277 Newport Avenue
Quincy, MA 02169
617-328-6900
BBO# 030190
(Michael Charros)

And

/s/_____
Terry Flukes (BBO #172140)
159 Thomas Burgin Parkway
Quincy, MA 02169
617-847-4440
(Geraldine Charros)
December 21, 1998

I hereby certify that a true copy of
the Motion to Suppress (Without Warrant)
was served upon (each party appearing)
the attorney of record for each party by
hand delivery on 12/21/98
/s/

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS. SUPERIOR COURT
NOS. 9873CR0331A-E &
9873CR0332

COMMONWEALTH

V.

MICHAEL CHARROS AND
GERALDINE CHARROS

FILED
DEC 21 1998
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

AFFIDAVIT OF COUNSEL IN SUPPORT OF ALL DEFENDANTS' MOTIONS

I, Theodore A. Barone, hereby depose and state, under oath, and upon my own personal knowledge, information, and belief, the following:

1.) I represent Michael Charros in the above-captioned matter.

2.) I have received information that an individual known to my client entered 164 Query Street (first floor) on August 10, 1998 with a large quantity of what is now believed to be a controlled substance known as cocaine, which alleged cocaine has been attributed to my client and his wife, Geraldine Charros. It is my understanding that subject individual's entry occurred just minutes before my client and his wife and son left 164 Query Street and were confronted by members of the New Bedford Police Department.

3.) I believe and therefore state that subject individual is referred to in the search warrant affidavit as CI-1.

4.) I believe and therefore state that the search warrant affidavit makes reference to the following:

> CI-1 states that it has been inside of the target's apartment within the last 72 hours at which time it has purchased cocaine and observed more cocaine inside the apartment.

5.) I believe and therefore state . . . provided to me indicates that members of the New Bedford Police Department were conducting pre-raid surveillance just before my client and his wife were confronted by the police in a motor vehicle at or near the intersection of Acushnet Avenue and Covell Street. From my reading of the discovery, it is apparent that my client and his wife and the motor vehicle were detained, searched, and seized without a showing of a warrant. My reading of the discovery indicates that my client and his wife were then brought back to 164 Query Street (first floor).

6.) I believe and therefore state that law enforcement authorities knew or should have known that the individual whom I believe to be CI-1 entered 164 Query Street (first floor) with a quantity of what is now believed to be cocaine and which has now been attributed to my client and his wife.

7.) I believe and therefore state that the indication in the search warrant set forth in preceding paragraph 4 materially misstates the true facts surrounding the search, seizure and arrest involving my client and his wife.

8.) My client is a diabetic. I am informed and therefore state that after he was returned to his home while in custody and the New Bedford Police conducted a search of the premises, my client had a serious reaction associated with his diabetes but was not able to obtain and swallow any item that contained sugar until much later in the day.

Executed upon information received and belief under penalties of perjury this 21st day of December, 1998.

/s/_____
Theodore A. Barone

I hereby certify that a true copy of
the Affidavit of Counsel
was served upon (each party appearing)
the attorney of record for each party by
hand delivery on 12/21/98
/s/

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS. SUPERIOR COURT
Nos. 9873CR0331

COMMONWALTH [*sic*]

V.

MICHAEL CHARROS

AFFIDAVIT OF MICHAEL CHARROS

I, Michael Charros, hereby depose and state upon my own personal knowledge, information, and belief, the following:

1.) I am the defendant in the above-captioned matter.

2.) I was legally operating a motor vehicle that was stopped by members of the New Bedford Police Department on August 10, 1998 at or near the intersection of Acushnet Avenue and Covell Street.

3.) I was not shown a search warrant or arrest warrant at the scene of the stop.

4.) The motor vehicle and ~~two~~ one passengers were searched.

5.) I was later charged with drug violations after being taken back to my then home at 164 Query Street, First Floor and further confronted by New Bedford Police Officers.

Executed under the penalties of perjury this 23rd day of March, 1999.

/s/
Michael Charros

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS. SUPERIOR COURT
NOS. 9873CR0331A-E &
9873CR0332

COMMONWEALTH

FILED
JUL 2 1999
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

MICHAEL CHARROS AND
GERALDINE CHARROS

SUPPLEMENTAL AFFIDAVIT OF GERALDINE CHARROS IN SUPPORT OF BOTH DEFENDANTS' MOTION TO SUPPRESS SEARCH AND SEIZURE (WITHOUT WARRANT) AS WELL AS STATEMENTS ATTRIBUTED TO DEFENDANT, MICHAEL CHARROS

I, Geraldine Charros, hereby depose and state, upon my own personal knowledge, information, and belief, the following:

1.) I am one of two defendants in this matter. The other defendant is my husband, Michael Charros.

2.) I was a passenger in a motor vehicle that was stopped by members of the New Bedford Police Department on August 10, 1998 at or near the intersection of Acushnet Avenue and Covell Streets. Michael Charros was driving the motor vehicle.

3.) Michael Charros and I were not shown a search or arrest warrant at the scene of the stop nor did anyone consent to the search.

4.) Michael Charros was searched at the scene.

5.) Michael Charros and I were shortly thereafter brought back to our then home at 164 Query Street, First Floor by New Bedford Police Officers. Throughout this entire time at the house, Michael and I were in handcuffs.

6.) Michael Charros and I were both charged with controlled substance violations.

7.) Michael Charros has been diagnosed with diabetes. In order to help deal with the disease, he carries a card that gives some explanation of his diabetes and a general description of some of the symptoms. A true copy of that card is attached hereto.

8.) I have witnessed numerous incidents that Michael Charros has had with the onset of a diabetes problem. At those times, he is unable to function normally and seems as if he is unable to take directions or understand what I may be saying to him.

9.) After Michael Charros and I had been brought back to 164 Query Street, First Floor, New Bedford, MA on August 10, 1999, he began having a diabetes episode.

10.) While the police searched 164 Query Street, First Floor, New Bedford, MA, Michael

Charros was slumping in a kitchen chair; continually repeating that he was not feeling well; and intermittently mumbling in a way that could not be understood.

11.) I requested several times of the New Bedford Police that we be allowed to get his glucose pills in order to help Michael, but my requests were to no avail until quite sometime later when a police officer retrieved the glucose pills from our truck and placed them on the kitchen table.

Executed under penalties of perjury this 30 day of June, 1999.

/s/
Geraldine Charros

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 9873CR0331A-E;
9873CR0332A-C

FILED
DEC 29 1999
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO SUPPRESS

On October 1, 1998, the Bristol County grand jury indicted the defendant, Michael Charros for trafficking a controlled substance in violation of G.L. c. 94C, Section 32E(b)(4); trafficking a controlled substance within a school zone in violation of G.L. c. 94C, Section 32J; conspiring to violate controlled substance laws in violation of G.L. c. 94C, Section 40; unlawful possession of a firearm without obtaining an identification card in violation of G.L. c. 269, Section 10(h); and unlawful possession of a firearm without complying with the requirements relating to the firearms identification card in violation of G.L. c. 269, Section 10(h).

On October 1, 1998, the Bristol County grand jury also indicted the defendant, Geraldine Charros for trafficking a controlled substance in violation of G.L. c. 94C, Section 32E(b)(4); trafficking a controlled substance within a school zone in violation of G.L. c. 94C, Section 32J; and conspiring to violate controlled substance laws in

violation of G.L. c. 94C, Section 40. Defendants are now before this court moving to suppress evidence as well as the statements made by defendant, Michael Charros. For the reasons discussed below, the defendants' motion to suppress evidence and Michael Charros' statement is **DENIED**.

BACKGROUND

On August 10, 1998, New Bedford police arrived at 164 Query Street in New Bedford to execute a search warrant at the apartment of the defendants. The detectives set up surveillance between 5:30 and 6:00 p.m. During that time, a van owned by the defendants left from their driveway at 164 Query Street. The police did not stop the van until it reached about one mile from 164 Query Street. The police chose not to stop the van in front of 164 Query Street in case someone was inside the Charros' apartment, who, upon viewing the detention of the van, could have destroyed any narcotics kept therein. Query Street is a one-way street and that fact affected police's ability to stop the van at an earlier point. Additionally, the van was stopped in the first lightly trafficked area available after leaving Query Street.

After the van was stopped, police detectives searched defendant Michael Charros ("Mr. Charros"). As a result of the search, police detectives found a small amount of cocaine in Mr. Charros' pocket. Both defendants were then brought back to 164 Query Street. The search warrant was given to defendants so that they could read it, and they were informed of their

Miranda rights. After searching 164 Query Street, police detectives found a large amount of cocaine, money, and a handgun. At the completion of the search, Mr. Charros made several incriminating statements to Detective Oliveira, including an admission to selling 250 grams of cocaine a month.

Additionally, Geraldine Charros ("Mrs. Charros") testified that Mr. Charros was complaining that he was not feeling well. She further stated that he laid his head down on the table and spoke in a confusing manner. She also testified that he exhibited signs consistent with her numerous, previous observations of his having diabetic episodes. The defendants also introduced medical and pharmacy records confirming the fact that Mr. Charros was a diabetic.

DISCUSSION

A. Search Conducted Pursuant to A Warrant

Under Massachusetts law, all searches must be accompanied by a search warrant with a few specifically-established and well-delineated exceptions. Search warrants are issued by impartial magistrates or judges following review of a warrant application. G.L. c. 276, § 1; Commonwealth v. Moran, 353 Mass. 166 (1967). The application must include an affidavit containing facts, information, and circumstances upon which the affiant is relying in order to establish sufficient grounds to issue the warrant. G.L. c. 276, § 2B.

In order to establish probable cause, the affidavit must "contain enough information for the issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they may reasonably be expected to be located in the place to be searched." Commonwealth v. Lopez, 31 Mass. App. Ct. 547 (1991), rev. den. 411 Mass. 1105. In reviewing the warrant application to determine whether probable cause to issue the warrant existed, the court should read the affidavits in an ordinary, common-sense manner without hyper technical analysis. Commonwealth v. Melendez, 407 Mass. 53, 60 (1990).

A common method of establishing probable cause is through information supplied to the police by a confidential informant. Where an affiant relies on information from a confidential informant, the affidavit must satisfy the two-pronged test set forth in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. U.S., 393 U.S. 410 (1969), before a finding of probable cause can be made. Commonwealth v. Upton, 394 Mass. 363, 374 (1985). The Supreme Judicial Court in Upton, by adopting the two-pronged Aguilar-Spinelli test, rejected the Supreme Court's adoption in Illinois v. Gates, 462 U.S. 213 (1983), of the "totality of the circumstances" test. Upton, 394 Mass. at 374. Under the Aguilar-Spinelli standard, the affidavit must set forth facts of (1) some of the underlying circumstances from which the informant concluded that the items were where he claimed they were (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the information was credible or reliable

(veracity test). Upton, 394 Mass. at 375. Each element of the test must be separately considered and satisfied or supplemented in some way. Id. at 376.

In the case at bar, Detective Oliveira's affidavit established probable cause since the articulable information fulfilled both the knowledge and veracity tests. Detective Oliveira provided two informants in support of his affidavit for search warrant. His first informant had proven himself reliable in the past, having provided information in the past that led to a prior arrest and conviction. The informant's information included the fact that he had purchased cocaine from Mr. Charros more than once and that Mr. Charros had delivered cocaine to him while Mr. Charros was in his pick-up truck. Detective Oliveira's second informant offered similar information. The information provided by both informants was corroborated by police surveillance. Further, after surveillance, Detective Oliveira described in his affidavit what could be viewed as cocaine deliveries by Mr. Charros. Applying the Aguilar-Spinelli standard, the information used by Detective Oliveira in his affidavit passes both the knowledge and veracity test since the informants had personal knowledge of Mr. Charros' cocaine trafficking and one of the informants provided reliable information in the past. Hence, because Detective Oliveira established probable cause in his affidavit, the search warrant to search 164 Query Street was valid.

B. The Detention and Returning of Defendants to Their Residence

The defendants argue that their arrest approximately one mile from 164 Query Street was improper. Defendants were detained a mile away from their residence and brought back to their residence immediately before police detectives began searching their residence on 164 Query Street. While there is no Massachusetts case law that directly addresses the constitutionality of being detained and returned to one's home to be present for a search pursuant to a warrant, relevant authority exists that suggests that police actions were constitutional.

In Michigan v. Summers, 452 U.S. 692 (1981), the Court held that the initial detention of the defendant descending his front steps while the police executed a search warrant to search his home did not violate the Fourth Amendment. The Court stated that "the warrant, founded on probable cause, implicitly carried with it the limited authority to detain the occupants of the premises while a proper search was executed" and that because it was lawful to detain the occupants until evidence establishing probable cause to arrest him was found, his arrest and search incident thereto were constitutionally permissible. Id at 340.

The Supreme Court reasoned that "of prime importance in assessing the intrusion is the fact that police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that

house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself."

Id. at 340-341. Further, the Court articulated three legitimate law enforcement interests in discerns that there is a legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Second, there exists an interest in minimizing the risk of harm to police officers. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. Third, the orderly completion of the search may be facilitated if the occupants of the premises are present. Id. at 349-350.

In addition to the Supreme Court's decision in Michigan v. Summers, other federal cases support the actions the police took in this case. In U.S. v. Cochran, 939 F.2d 637, 638 (6th Cir. 1991), the court found that Michigan v. Summers applies when the police had stopped the defendant after he had driven a short distance from his home. The court stated that the focus on whether police action is permissible should be on police performance rather than geographic proximity; meaning that courts should examine whether the police detained the defendant as soon as it was practical to do so after defendant departed from his residence. Id at 640.

Defendants, however, argue that Michigan v. Summers is easily distinguishable from the case at bar. Defendants cite several authorities in support of their argument that police acted inappropriately in detaining the defendants. Upon review of each party's authority, this court believes that the authority cited by the defendants is distinguishable from the case at bar while Michigan v. Summers more aptly applies to the facts of this case. The defendants rely on U.S. v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994) to argue that the police detectives detention of the defendants was unconstitutional. In Hogan, the Eighth Circuit distinguished Michigan v. Summers holding in part that "the intrusiveness of the detention was therefore much greater in Summers" and that there was no risk of harm to the agents from the defendant who was in a car miles away from the premises. Id. at 693.

Defendants also rely on United States v. Sherrill, 27 F.3d 344, 346 (1994) to support their position. In Sherrill, the detention of defendant one block from his home after he drove away from it was not authorized by Summers as the "intrusiveness of the officers' stop and detention on the street was much greater" and "officers had no interest in minimizing the search's risks because Sherrill had left the area of the search and was unaware of the warrant." Id. at 346. Both Sherrill and Hogan are distinguishable because in both cases there was no interest to minimize any risks to losing any evidence or to alleviate dangerous activity and provide greater safety for the police detectives unlike the case at bar.

Considering the relevant Supreme Court and federal case law, New Bedford police's actions were constitutional given all circumstances surrounding this case. The police received a search warrant for 164 Query Street. The police chose to wait until they saw someone exit the residence. Based upon experience and training, the police believed that waiting was a safer course of action. The police also believed that if the defendants had been stopped in front of the house, evidence could have been destroyed by anyone possibly remaining inside the house. Thus, the police stopped the defendants at the most practical moment- approximately a mile away from their residence in lightly trafficked area.

The police's seizure of defendants and their return to the residence was done to advance the three governmental interests advanced in Michigan v. Summers. New Bedford police had a legitimate interest in preventing flight in the event that incriminating evidence was found by waiting for the defendants to exit the residence; they wished to minimize the risk of harm to their officers also by waiting for the defendants to exit their residence; and they completed the search in an orderly fashion by having the occupants of the premises present. Furthermore, this court is conscious of the fact that the defendants are allegedly involved in trafficking narcotics. Since evidence of narcotics can be quickly destroyed and police apprehension of narcotics defendants can be highly dangerous, police detectives' conduct was appropriate. Finally, because the police detectives' conduct advanced the legitimate governmental interests supported by Michigan v.

Summers, the detention and returning of the defendants to their residence was constitutional.

C. Mr. Charros' Statements

Defendant, Michael Charros also argues that the statements that he had made to police should be suppressed. After police read Mr. Charros his Miranda rights, he admitted that he was selling 250 grams of cocaine a month. He now argues that he could not have knowingly, intelligently, and voluntarily waived his Miranda rights because he was suffering from a diabetic reaction. Defendant, however, did not testify and did not establish sufficient evidence that he did not understand nor volunteer the statements he made to police detectives. While Mr. Charros established that he has a history of diabetes, he has not produced sufficient evidence that he suffered from a diabetic reaction at the time he incriminated himself. Further, he did not establish that his diabetic reaction affected his ability to knowingly, intelligently, and voluntarily waive his rights. At the same time, police officers attest that Mr. Charros was sober, alert, walking normally, and speaking with intelligible speech, and that there was no indication that his waiver of Miranda was anything other than knowing, intelligent, and voluntary. Commonwealth v. Day, 387 Mass. 915, 918 (1983). Accordingly, defendant's statements made to police are admissible and will not be suppressed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that defendants' motion to suppress is **DENIED.**

/s/
John A. Tierney
Justice of the Superior Court

DATED: December 29, 1999